



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 410 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ERICK OTIENO ORICHO.....1ST CLAIMANT
ERICK AWUONDO ODIDA.....2ND CLAIMANT
TITUS ODHIAMBO OMANYI.....3RD CLAIMANT
GEORGE OCHIENG ANANGA.....4TH CLAIMANT
DAN KIDHA KIDHA.....5TH CLAIMANT
PHILIP ODUOR OCHIENG.....6TH CLAIMANT
GEORGE ODHIAMBO KABONGAH.....7TH CLAIMANT

VERSUS

THE COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT
ACTING COUNTY SECRETARY KISUMU
DR. COLANG'O ONUDI.....2ND RESPONDENT
THE GOVERNOR KISUMU
H.E PROF. PETER ANYANG' NYONG'O.....3RD RESPONDENT

RULING

The claimants are employees of the Kisumu County Public Service Board, the 1st respondent herein having been employed variously as follows –

Eric Otieno Oricho, 1st claimant was appointed as protocol officer by letter dated 29th August 2013.

Eric Awuondo Odida, the 2nd claimant was appointed as Director of Special

Programs, Projects and Delivery Unit by letter dated March 2015 on a five year contract term.

Titus Odhiambo Omanyi, the 3rd claimant was appointed as Director of protocol by letter dated 29th August 2013 for a contract term of five years.

George Ochieng Anyanga, the 4th claimant was appointed as Policy and Strategy Research – Cabinet Office, by letter dated 8th July 2013 for a five year term of contract commencing 17th March 2013.

Dan Kidha Kidha, the 5th claimant was appointed as Director, Cabinet/Research Policy by letter dated 24th March 2015 on a five year contract term commencing on 17th March 2013.

Philip Oduor Ochieng, 6th claimant was appointed to the post of Advisor Political Affairs by letter dated 29th May 2015 on a three year contract commencing 1st January 2015.

George Odhiambo Kabonga, the 7th claimant was appointed to the post of a Director by contract dated 24th March 2015.

All claimants were appointed after a competitive process by the County Public Service. Their letters of appointment were signed by County Secretary.

All claimants were served with letters dated 30th August 2017, titled “*Notice of Termination of Contract*”. The body of the letter states –

“NOTICE OF TERMINATION OF CONTRACT”

Reference is made to our letter Ref. CGK7HR/AFFT/2015/VOL 1, dated 23rd March 2015, on your appointment in the position of Protocol Officer (Senior Officer I)

Following the ongoing restructuring and re-organization of the County Government, we wish to notify you that your contract will be terminated by 30th September 2017. This letter serves to give you one month’s notice as provided for in your appointment letter and in the Employment Act 2007, Part VI, Section 35(1).

You are required to utilize any pending leave during this period. Your benefits will be released upon clearance from liabilities with the County Government.

Thank you for the services rendered to the citizens of Kisumu County and Kenya at large during your tenure in the above position.

We wish you well in your endeavours.”

The claimants were aggrieved by the letters of termination and filed this suit.

In their memorandum of claim dated 18th October and filed on 19th October 2017, they aver that the letters of notice of termination were served upon them on 9th October 2017 effectively meaning that their contracts had come to an end with the term of the outgoing Governor whose term of office ended following the general elections of August 2017. The claimants further aver that their letters of termination do not draw authority from the County Public Service Board who is their employer, that immediately upon receiving the letters they sought audience with the 2nd respondent, the Acting County Secretary, Kisumu Dr. C. Olang’o Onudi who refused to give them audience. They thereafter sought audience with some members of the County Public Service Board who informed them that the Board had not addressed the issue of termination of their contracts or authorised the 2nd respondent to terminate their services.

The claimants aver that the 2nd respondent who is the Head of the County Public Service has no authority to arbitrarily undertake mass sackings of county public service employees without express authority of the County Public Service Board, that based on legitimate expectation that they would serve to the expiry of their contracts they made financial commitments to third parties and are likely to be embarrassed financially and lose their careers without justifiable cause should their termination not be stopped by the court.

The claimants aver that they have been subjected to unfair labour practice and unless the 2nd respondent is restrained they stand to suffer. They pray for the following remedies –

- a. A declaration that the actions of the 2nd respondent of seeking to terminate the claimants’ employments by dint of notices of termination dated 30th August, 2017 has not been sanctioned by lawful authority, is malicious, illegal, unfair, unlawful and therefore null and void.
- b. An injunction to restrain the respondents from advertising for the positions of the claimants and processing any applications so far received for the positions of the claimants before their contracts expire and to restrain the respondents from unlawfully terminating the claimants’ employment without any justifiable, reasonable and necessary cause and without following due process.
- c. Costs of this claim.
- d. Any other relieves the honourable court may deem fit to grant.

Simultaneously with the memorandum of claim, the claimants filed an application by way of Notice of Motion made under Sections 27, 28, 35, 45 and 47 of the Employment Act, Part II of the Industrial Court Act, 2011 (sic) and any other enabling provisions of the law in which they sought the following prayers –

1. The court be pleased to certify this application as urgent and admit the same for hearing *ex-parte* for grant of prayer 2 below.

2. The court be pleased to issue an order staying the operationalisation of the notices of termination of the claimants' contracts dated 30th August 2017 and restraining the respondents from advertising for the positions of the claimants pending the hearing and determination of this application *inter-partes*.

3. The court be pleased to issue an order staying the operationalisation of the notices of termination of the claimants' contracts dated 30th August 2017 and restraining the respondents from advertising for the positions of the claimants pending the hearing and determination of this claim.

4. Costs of the application are provided for.

The grounds in support of the motion are that the 2nd respondent issued backdated notices of termination of their jobs without sanction of the 1st respondent and that their positions may be advertised at any time. That they are threatened with premature loss of careers and jobs with a consequence of mental strain and unnecessary financial embarrassment and that should the actions of the 2nd respondent not be restrained, an illegality shall have been allowed to thrive at their expense.

Each of the claimants swore an affidavit in support of the application.

The claimants named the Kisumu Public Service Board as the 1st respondent, the Acting County Secretary, Kisumu County Dr. C. Olang'o Onudi as the 2nd respondent and the Governor Kisumu County, H. E. Prof. Peter Anyang' Nyong'o as the 3rd respondent.

The claimants' counsel appeared before me and argued the application *ex-parte* on 19th October 2017, upon which I certified the application urgent and granted orders of status quo pending the *interpartes* hearing of the application.

The 1st and 2nd respondents opposed the application and filed a replying affidavit of HESBON OWUOR HONGO, the Secretary to the 1st respondent in which he deposes that the 1st respondent as a body corporate has mandate to establish public offices such as those held by the claimants so long as they serve the public interest in line with core functions of the County Government. He deposes that the appointment of the claimants was by letters of appointment signed by the then County Secretary on instructions of their Governor who was exercising his discretion and was not bound to consult the Board save for the purpose of regularising the appointments, that the appointments of the petitioners were purely by the Governor's discretionary powers and such appointees do not appear before the assembly, that in re-organising the government after winning in the general elections of 8th August 2017, the 3rd respondent structurally re-oriented the departments with specific duties and responsibilities in keeping with his winning manifesto, that the claimants' appointments were tailor made to fit within the five year cycle of the appointing Governor's term and is therefore tied to the pre-set deliverables and targets of the office holder whose success was determined by the performance re-evaluation process by the appointing Governor.

Mr. Hongo deposes that the letters of appointment provide for an exit clause by either party and termination by the incoming administration using the said procedure does not amount to unfair labour practice. It is further Mr. Hongo's position that the petitioners have not exhausted the available statutory channels before coming to court as envisaged under Section 77 of the County Governments Act.

Mr. Hongo deposes that the filing of this case is a violation of the doctrine of separation of powers requiring the court to interfere in the powers, functions and discretion of the 2nd respondent in constituting and configuring the government contrary to Article 176 and 179 of the Constitution.

He prays that the application be dismissed and the interim orders discharged.

The 3rd respondent filed grounds of opposition as follows –

1. There is no cause of action against the 3rd Respondent, his joinder herein is vexatious, accordingly the 3rd Respondent should be discharged from the proceedings at the earliest.
2. The impugned notices of termination are legally valid and grounded under Section 35(1)(c) of the Employment Act, 2007.
3. The applicants are guilty of laches as the orders sought have been overtaken by events and do not lie.
4. The holders of the subject offices are handpicked by the Governor, and do not undergo any competitive recruitment, interviews or approval by the County Assembly.
5. The applicants have committed and are in active commission of perjury.
6. The applicants have come to court with dirty hands and are accordingly most undeserving of the orders sought which are equitable remedies.
7. The affidavits supporting the application contain mere averments bereft of any evidence or factual foundation and are at best rumour mongering.
8. No *prima facie* case has been made to sustain the orders sought.

9. The entire application and claim is frivolous, vexatious, constitute unmitigated abuse of the honourable court process and should be struck out and/or summarily dismissed with costs to the 3rd respondent.

Applicants' Case

At the hearing of the application Mr. Nyamweya, counsel for the claimants/applicants submitted that the notices were illegal, unlawful, malicious and unfair and should be declared null and void. He submitted that the office of the 3rd respondent, the Governor, has no role according to Section 30(2) of the County Governments Act, that Section 30(2)(d) gives the Governor powers to appoint members of the executive committees, Section 45(1) gives the Governor powers to appoint Chief Officers but no powers to terminate. That he only has powers to re-assign. That Directors are not answerable to the Governor, that the only persons the Governor can touch are the members of the County Executive Committee and County Secretary, but a Governor cannot remove County Chief Officers who are employees of the County Public Service.

Mr. Nyamweya submitted that Section 46 of the County Governments Act provides that Directors are departmental heads in departments established by the County Chief Executive Officer, under Section 46(1), that subsection 46(2)(b) makes provision that the holders are County Public Service Officers and are therefore civil servants, that they should not be treated unfairly or with discrimination.

Mr. Nyamweya submitted that Section 49 as read with Section 63(1) provides for County Public Service Board whose functions include appointing persons to hold positions in public offices, that Section 59(1)(c) deals with discipline of public servants while Section 59(1)(e) engenders the Public Service Board to uphold values under Articles 10 and 232 of the Constitution in promoting culture of good public service. That the provisions envisage due process as stipulated under Section 63(2) and circumstances when the Public Service Board can remove or discipline public officers on request of Chief Officers, appointing authority or Clerk of County Assembly, or on its own motion.

That in all such cases the Public Service Board has to comply with Section

76(1) and (2) which envisage natural justice, that no public officer may be punished in a manner contrary to the provisions of the constitution or an act of parliament, that there must be observance of Article 41 on fair labour practices and Article 47 on Fair Administrative Action which must be lawful, reasonable and procedurally fair, Article 50 on fair hearing and Article 236 on discipline of public servants.

He submitted that Section 42(1) provided for reorganisation of the members of County Executive Committee only.

He submitted that the County Public Service Board has its own Secretary and the 2nd respondent had no authority to issue the letters of termination to the claimants, that he can only do so with express authority of the County Public Service Board when conveying the decision of the Board, that in the letters the 2nd respondent does not refer to the person under whose authority he was acting and especially does not refer the County Public Service Board.

Mr. Nyamweya further submitted that the contracts of the claimants do not provide for an exit clause.

It was the submission of Mr. Nyamweya that the termination was not sanctioned by the Public Service and the claimants were not given audience before the termination.

Respondents' Case

The 1st and 2nd respondents oppose the application and filed a replying affidavit of Hesbon Owuor Hongo, the Secretary to the Kisumu County Public Service Board sworn on 27th October 2017 and further affidavits of Patrick Samuel Oketch Ochieng, an Administrative Officer, the Personal Assistant to the County Secretary sworn on 31st October 2017 and Kilei Kilinda, Legal Officer of the County Government of Kisumu sworn on 1st November 2017.

Patrick Samuel Aketch Ochieng deposes that he served the claimants with the letters of termination on the following dates–

Eric Otieno Orich – 29th September 2017

Eric Awuondo Odida – 4th September 2017

Titus Odhiambo Omanyi – 11th September 2017

George Ananga – 8th September 2017

Dan Kidha – 15th September 2017

Philip Oduor Ochieng – 29th September 2017

George Kabonga – 1st September 2017

That the claimants received the letters and signed for them either personally or through authorised representatives.

Kilei Kilinda deposes that Eric Awuondo Odida the 2nd claimant received his letter before 14th September 2017 and sent a demand letter dated 14th September 2014 to the respondent through Behan and Okero Company Advocates.

Mr. Amondi for the 1st and 2nd respondents submitted that the 2nd respondent sent letters of termination of contract to the claimants on the basis that they were employees of the Public Service Board in his capacity as Head of County Public Service, the notices were sent in compliance with termination clause of their contracts and where termination was not provided for in the contract, by virtue of the provisions of Section 35 of the Employment Act. He submitted that claimants were appointees of the County Governor and the County Public Service Board's only role was to regularise the appointments, that the positions held by the petitioners were personal and none of them went through a competitive selection process and their appointment was pegged to the term of the Governor who appointed them. He submitted that the termination notices were not backdated as confirmed by the two further affidavits, that the process of termination was proper and the mere fact that the contracts were phrased beyond the term of the claimants' previous appointing authority cannot be cured by the termination clause.

Mr. Obondo for the 3rd respondent relying on the grounds of opposition submitted that the 3rd respondent would adopt the position and submissions of the 1st and 2nd respondents. He submits that the claimants are guilty of lack of candour and perjury for stating that they were served on 11th October 2017 as the further affidavit proves the dates of receipt of the letters, that the respondents could not force the claimants to pick the letters after calling and informing them to collect the letters. He submits that all the letters are deemed to be decisions of the Governor.

He submitted that none of the claimants has submitted proof that the process of their engagements was competitive. He submitted that they were political appointees serving at the pleasure of their Master and went home with their Master. He further submitted that there is no allegation against the 3rd respondent who he submits was joined in this proceedings to vex him, that his joinder is an abuse of court process and the case should be dismissed with costs.

In a rejoinder, Mr. Nyamweya submitted that the 3rd respondent was enjoined because of the averment of restructuring in the letters of termination. He submitted that Section 35 of the Employment Act does not provide for standard notice as alleged by the counsel for the respondents. He submitted that a Governor cannot create and abolish positions in County Public Service, that Section 61(1) of the Act provides for creation and abolition of offices and for redeployment and not for termination. He submitted that the reasons for the termination which was not addressed by the respondents, is not valid and Article 236 applies to the claimants.

Determination

The issues for determination are the following –

1. Whether or not the petitioners were political appointees of the Governor whose term ended with the Governor's term.
2. Whether the notices of termination of the contracts of the petitioners are null and void.
3. Whether the petitioners are entitled to the orders sought.

Nature of Contracts of Petitioners

The petitioners' case is that they were employees of the County Public Service Board while it is the respondent's position that they were political appointees who served at the pleasure of their appointing authority and thus their services came to an end when the term of office of their appointing authority ended.

The letters of appointment of the petitioners are on the letterhead of the County Government of Kisumu and signed by the then County Secretary, Mr. Humphray O. Nakitari. The letters for Philip Odour Ochieng, Dan Kidha Kidha and Erick Awuondo Odida expressly state that their appointments are with the approval of the County Public Service Board. The letters of the other petitioners state that their appointment was by the Governor.

Under the County Governments Act the Governor has powers to appoint members of the County Executive Committee and accounting officers for each department, entity or decentralised unit of the County Government. The Governor further has powers to remove a member of the County Executive Committee but does not have powers to remove the accounting officers. Power to remove any officer from the County Public Service, other than members of the County Executive Committee is vested in the County Public Service Board under Section 76 of the Act. The County Secretary may only terminate the services of an officer of the County Public Service where such powers have been delegated the County Secretary in writing as prescribed under Section 86 of the Act.

Further, the Governor, or County Secretary have no powers to appoint officers in the public service unless such powers have been delegated under Section 86. Section 63 of the Act gives the County Public Service powers to appoint officers to all offices either on its own motion or at the request of a county Chief Officer or Clerk of the County Assembly. Whenever there is any irregularity in appointment it is the County Public Service that is vested with the power to take action on the irregularity as provided under Section 75 by revoking the decision, directing the Head of Department concerned to take corrective measure or taking the corrective measure by itself.

The County Public Service is required to observe the principles of natural justice wherever it is exercising its disciplinary powers.

From the foregoing, it is clear that the arguments by the respondent to the effect that the petitioners were appointed at the pleasure of the Governor, or that the County Secretary acted within the law in issuing notices of termination of petitioners was without authority and in

contravention of the provisions of the County Governments Act as no such powers had been delegated to either the Governor or the County Secretary by the County Public Service Board. The Governor did not have powers to make political appointments to the offices held by the petitioners which are offices in the County Public Service.

The arguments by the respondents that the removals complied with Section 35 of the Employment Act are also not valid as Section 35 does not provide for termination but only for notice of termination. Further, Section 35 does not operate in exclusion of Section 41 and 43 which require that an employee be given a hearing and that there must be valid reason for removal before the Section on termination notice can be applied. Furthermore, the Employment Act does not apply to an employee whose terms of service are expressly provided for in other legislation as in the case of officers in the public services, unless such terms of service are in contravention of the provisions of the Employment Act, which has not been alleged herein.

In view of the foregoing, I find that the 2nd and 3rd respondents had no powers to issue termination notices to the petitioners and the issuance of the said notices were *ultra vires* with the effect that they are null and void. I therefore confirm the stay of the operationalisation of the notices of termination issued to the claimants pending the hearing and determination of the petition herein.

For the avoidance of doubt these orders only apply to the extent that the contracts of appointment of the petitioners are still valid. Where the terms of the contract has lapsed, the orders are only valid up to the date on which the contract lapsed.

In view of the fact that this ruling may have resolved all the issues for determination in the petition, the parties are advised to consider adopting the ruling as a final order in the petition.

The petitioners shall have the costs of the application.

DATED AND SIGNED AT NAIROBI ON THIS 14TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 14TH .DAY OF FEBRUARY 2019

MATHEWS NDERI NDUMA

JUDGE